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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Improve
Public Access to Public Records Pursuant to
the California Public Records Act.

Rulemaking 14-11-001
(filed November 6, 2014)

APPLICATION OF

**CALAVERAS TELEPHONE COMPANY (U 1004 C)
CAL-ORE TELEPHONE CO. (U 1006 C)
DUCOR TELEPHONE COMPANY (U 1007 C)
FORESTHILL TELEPHONE COMPANY (U 1009 C)
HAPPY VALLEY TELEPHONE COMPANY (U 1010 C)
HORNITOS TELEPHONE COMPANY (U 1011 C)
KERMAN TELEPHONE COMPANY (U 1012 C)
PINNACLES TELEPHONE CO. (U 1013 C)
THE PONDEROSA TELEPHONE COMPANY (U 1014 C)
SIERRA TELEPHONE COMPANY, INC. (U 1016 C)
THE SISKIYOU TELEPHONE COMPANY (U 1017 C)
VOLCANO TELEPHONE COMPANY (U 1019 C)
WINTERHAVEN TELEPHONE COMPANY (U 1021 C)
("Small LECs")**

AND

**CONSOLIDATED COMMUNICATIONS OF CALIFORNIA COMPANY (U 1015 C)
(F/K/A SUREWEST TELEPHONE) ("Consolidated")**

FOR REHEARING OF DECISION 16-08-024

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. PERTINENT FACTUAL BACKGROUND AND PROCEDURAL HISTORY.....	3
A. The Parties and Their Interest in Protecting Confidential Documents.....	3
1. Consolidated.....	3
2. The Small LECs.....	4
B. Procedural Events Leading Up to the Decision.....	5
C. The Decision and Its Ramifications.....	6
1. The Release Procedure.....	7
2. The Submission Protocol.....	8
III. STANDARD OF REVIEW AND SUMMARY OF LEGAL ERRORS COMMITTED BY THE DECISION.....	9
IV. THE DECISION VIOLATES STATUTORY AND CONSTITUTIONAL DIRECTIVES, AND CONFLICTS WITH BINDING APPELLATE AUTHORITY...11	
A. The Decision's Regulations Governing the Release of Confidential Documents Contravenes Statutory Authority, Violates Well-Established Administrative Law Requirements, and Exceeds the Scope of the Proceeding.....	11
1. In Permitting Confidential Documents To Be Released Without A Commission Order, the Decision Violates the Express Terms of Public Utilities Code Section 583.....	11
a. Public Utilities Code Section 583 Requires a Formal Order of the Commission Before Information Designated as Confidential Can Be Released.....	11
b. Statutory Authority Bars Delegation of the “Order” Requirement.....	14
c. Confidentiality Determinations by the Commission’s Legal Division Are Not “Orders” Under Public Utilities Code Section 583.....	14
d. The Decision to Delegate Authority to Legal Division Cannot Qualify as an “Order” Under Public Utilities Code Section 583.....	14
2. In Delegating Blanket Decision-Making Authority to the Commission's Legal Division to Determine Whether Documents Are Confidential, The Decision Violates Administrative Law Prohibitions on Delegation of Discretionary	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Authority.....	16
3. In Adopting Rules That Permit the Release of Confidential Documents Outside of a CPRA Request, the Decision Exceeds the Defined Scope of the Proceeding and Conflicts with Binding Appellate Authority.....	18
4. In Relying on Parties' Submission Designations to Control CPRA Determinations, the Decision Ignores the Commission's Responsibilities Under the CPRA.....	21
5. The Decision's Failure to Provide Notice and An Opportunity to Be Heard to Parties' Whose Confidential Documents Would Be Disclosed Violates Parties' Procedural Due Process Rights.....	22
B. The Decision's Adoption of the Document Submission Protocol Exceeds the Bounds of the Proceeding, and Represents Arbitrary and Capricious Decision-Making Unsupported by Sufficient Findings.....	24
1. The Decision's Requirements for Submission of Confidential Documents Are Outside the Defined Scope of the Proceeding, and in Conflict with Binding Authority From the California Court of Appeal.....	24
2. In Extending The Document Submission Protocol to Formal Proceedings, the Commission Further Exceeds the Boundaries of the Proceeding and Modifies a Commission Procedural Rule Without Proper Notice.....	26
3. The Decision's Document Submission Requirements Are Arbitrary and Capricious Regulations That Are Not Supported by Sufficient Findings.....	27
V. REQUEST FOR ORAL ARGUMENT.....	29
VI. CONCLUSION.....	30

TABLE OF AUTHORITIES

Page

CASES

<i>California School Employees Association v. Personnel Commission</i> , 3 Cal.3d 139 (1970)	16
<i>Carrancho v. California Air Res. Bd.</i> , 111 Cal.App.4 th 1255 (2003)	27
<i>City of Huntington Beach v. Pub. Util. Comm'n.</i> , 214 Cal.App.4 th 566 (2013)	18,25
<i>County of Los Angeles v. Superior Court</i> , 211 Cal.App.4 th 57 (2012)	21
<i>DVD Copy Control Association, Inc. v. Bunner</i> , 31 Cal.4 th 864 (2003)	22-3
<i>Federal Express Corp. v. Cal. Pub. Util. Comm'n.</i> , 1993 U.S. Dist. LEXIS 13830 (N.D. Calif. 1993)	15
<i>Gresher v. Anderson</i> , 127 Cal.App.4 th 88 (2005)	23
<i>Greyhound Lines, Inc. v. Public Utilities Commission</i> , 65 Cal.2d 811 (1967)	27
<i>Imperial Merchant Services, Inc. v. Hunt</i> , 47 Cal.4 th 381 (2009)	15
<i>Los Angeles Metropolitan Transit Authority v. Cal. Pub. Util. Comm'n.</i> , 59 Cal. 2d 863 (1963)	15
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	22
<i>McBail v. Solano County Local Agency Formation Comm'n.</i> , 62 Cal.App.4 th 1223 (1998)	27
<i>Pacific Gas & Electric Co. v. Department of Water Resources</i> , 112 Cal.App.4 th 447 (2003)	12
<i>People v. Connor</i> , 115 Cal.App.4 th 669 (2004)	13
<i>Ruckelhaus v. Monsanto</i> , 467 U.S. 986 (1964)	23
<i>Sacramento Chamber of Commerce v. Stephens</i> , 212 Cal. 607 (1931)	16
<i>Southern California Edison v. Public Utilities Commission</i> , 140 Cal.App.4 th 1085 (2006)	1,18-9, 25
<i>Southern California Edison Company v. Public Utilities Commission</i> , 227 Cal.App.4 th 172 (2014)	16-7
<i>U.S. Ecology, Inc. v. State of California</i> , 92 Cal.App.4 th 113 (2001)	17
<i>Woodbury v. Brown-Dempsey</i> , 108 Ca.App.4 th 421 (2003)	27
<i>Zuehlsdorf v. Simi Valley Unified Sch. Dist.</i> , 148 Cal.App.4 th 249 (2007)	27-8

STATUTES

Cal. Const., art.I,§7	22
Cal. Civ. Code § 3426.1	23
Cal. Gov. Code § 6253	21
Cal. Gov. Code § 6255	17,21
Cal. Gov. Code § 6276.36	13
Cal. Pub. Util. Code § 7	14
Cal. Pub. Util. Code § 311	15
Cal. Pub. Util. Code § 311.5	15
Cal. Pub. Util. Code § 454.52	15
Cal. Pub. Util. Code § 581	13
Cal. Pub. Util. Code § 582	13
Cal. Pub. Util. Code § 583	passim

1	Cal. Pub. Util. Code § 1751.1(a)(1)	passim
	Cal. Pub. Util. Code § 1751.1(a)(2)	passim
2	Cal. Pub. Util. Code § 1751.1(a)(3)	passim
	Cal. Pub. Util. Code § 1751.1(a)(4)	passim
3	Cal. Pub. Util. Code § 1751.1(a)(6)	passim
	Pub. Util. Code § 1822	15
4	Pub. Util. Code § 2104.5	15
5	U.S. Const., amend XIV	22

6 **CPUC DECISIONS**

7	D.00-09-042	12
	D.16-08-024	passim
8	<i>Compensated Intercompany Hauling Excluded From Definition of High Way Carriers</i> , Adoption of General Order 146-A, D.82-09-086, 1982 Cal. PUC LEXIS 1278	15
9	<i>Investigation on the Commission's Own Motion Into the Operations and Practices of Harold E.</i> <i>Craft, Jr., doing business as Downtown Airporter and Sacramento Airporter</i> , I.94-08-001 (FOF 2), 1994 Cal. PUC LEXIS 58	15

11 **MISC.**

12	Commission's Rules of Practice and Procedure, Rule 1.3	18
13	Commission's Rules of Practice and Procedure, Rule 7.3	18
14	Commission's Rules of Practice and Procedure, Rule 11.4	2,26
	Commission's Rules of Practice and Procedure, Rule 15.1	12
15	Commission's Rules of Practice and Procedure, Rule 15.2	12
	Commission's Rules of Practice and Procedure, Rule 15.3	12
16	Commission's Rules of Practice and Procedure, Rule 16.3	29
	Stats 1515, c.91, p. 131, §28(d)	13
17	Stats 1951, c.765, p. 2047, §583	13

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1 **I. INTRODUCTION.**

2 Pursuant to Rule 16.1 of the California Public Utilities Commission's ("Commission")
3 Rules of Practice and Procedure ("Rules"), Consolidated Communications of California Company
4 (U 1015 C) (f/k/a SureWest Telephone) ("Consolidated") and Calaveras Telephone Company (U
5 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C) ("Ducor"),
6 Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C),
7 Kerman Telephone Co. (U 1012 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone
8 Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Winterhaven
9 Telephone Company (U 1021 C), and Volcano Telephone Company (U 1019 C) ("Small LECs")
10 (together, "Applicants") apply for rehearing of Decision ("D.") 16-08-024 (the "Decision").¹ The
11 Decision was issued on August 25, 2016, so the Application is timely under Rules 16.1 and 1.15.²

12 The Decision exceeds the defined scope of this proceeding, violates unambiguous statutory
13 directives, contravenes restrictions on agency delegation, and violates Applicants' constitutional
14 rights to due process of law. It must be vacated or corrected to avoid these numerous and serious
15 legal errors, and to avoid material ongoing harm to Applicants. If it is not, it will be subject to
16 annulment by the Court of Appeal pursuant to the standard outlined in Public Utilities Code
17 Section 1757.1 and based on the extensive authority presented in this Application.

18 The Decision's legal errors are both procedural and substantive. The Decision exceeds the
19 scope of the proceeding in several respects and thereby violates the Commission's own rules and
20 scoping restrictions imposed by the Court of Appeal. *See Southern Cal. Edison v. Pub. Util.*
21 *Comm.*, 140 Cal.App.4th 1085, 1104-6 (2006) (the Commission cannot address matters outside
22 the Scoping Memo). Although the proceeding was scoped to address the Commission's procedure
23 for processing California Public Records Act ("CPRA") requests and the release of documents
24 pursuant to such requests, the Decision adopts burdensome new rules governing the submission of
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26 ¹ Consolidated and the Small LECs have been active participants in this proceeding, and offered comments
27 during the proceeding as part of the group of carriers identified as the Communications Industry Coalition.

28 ² Because the 30th day following the issuance of the Decision fell on a weekend, the deadline for the
Application was the next business day, September 26, 2016.

1 documents. The Decision also intrudes on procedures in formal proceedings and modifies its
2 procedural rule for submitting confidential documents in proceedings (Rule 11.4), even though
3 these subjects were never part of the proceeding. Further, the Decision addresses the standards for
4 release of documents absent CPRA requests, thereby expanding its reach beyond the CPRA-
5 focused subjects in the Scoping Memo governing this proceeding. Even if they were within the
6 scope of the proceeding, which they are not, these new regulations are based on arbitrary and
7 capricious reasoning and insufficient findings that cannot satisfy administrative law standards.

8 The substantive conclusions and rule changes in the Decision are also unlawful. The
9 Decision adopts a process for release of documents marked as confidential by which Legal
10 Division staff may release such documents without an order of the Commission, without any
11 formal process, and without any notice to the parties' whose confidential documents are
12 implicated by potential disclosure. This document release procedure is directly at odds with the
13 requirement of Public Utilities Code Section 583 that documents submitted to the Commission
14 under a claim of confidentiality must remain confidential unless and until the Commission issues
15 an "order" to release them. Pub. Util. Code § 583. The release procedure also constitutes an
16 unlawful delegation to staff that violates statutory requirements and administrative law limits on
17 delegation of discretionary authority. The Decision compounds this error by authorizing
18 commission staff to release documents simply based on parties' compliance with the submission
19 protocol, but this direction cannot be squared with the Commission's duties under the CPRA. In
20 failing to give notice of potential disclosures to affected parties or any opportunity to be heard, the
21 Decision also violates parties' constitutional rights to due process of law.

22 The Decision is not consistent with the law, and its legal errors have created a material risk
23 that Applicants' confidential data will be compromised without Applicants ever knowing about it.
24 At the same time, Applicants will remain subject to a burdensome submission protocol that
25 deviates from the scope of this proceeding. The Commission should grant this request for
26 rehearing, correct the legal errors in the Decision, and return this proceeding to a legitimate
27 examination of the Commission's practices for processing and responding to CPRA requests.

1 **II. PERTINENT FACTUAL BACKGROUND AND PROCEDURAL HISTORY.**

2 **A. The Parties and Their Interest in Protecting Confidential Documents.**

3 **1. Consolidated.**

4 Consolidated is a mid-sized telephone company providing voice, data, and video services
5 in the greater Sacramento area. Consolidated operates as an Incumbent Local Exchange Carrier
6 (“ILEC”) , and, collectively with its affiliates, it operates a Competitive Local Exchange Carrier
7 (“CLEC”) and a long distance provider, and provides wholesale and retail broadband services, and
8 video services. Consolidated operates in a highly-competitive and dynamic market in which
9 information about competitors, their customers, and their competitive service offerings is
10 incredibly valuable. Even a small amount of financial or operational information, if disclosed to a
11 competitor, could make the difference between Consolidated retaining or winning a customer, and
12 that customer taking services from a competitor. In such a competitive environment, Consolidated
13 closely guards its confidential data.

14 While Consolidated keeps its operational, investment, and financial data
15 confidential to ensure that it does not fall into its competitors’ hands, Consolidated is required to
16 submit significant amounts of this confidential information to the Commission in certain
17 Commission proceedings, including recent proceedings in which Consolidated’s participation has
18 been involuntary. In particular, as part of the Commission’s “competition” proceeding in I.15-11-
19 007, Consolidated has been required to submit volumes of confidential information, some of
20 which has been formally filed with the Commission and some of which has been provided to ORA
21 as part of the discovery process. The materials that the Commission has collected in that
22 proceeding are wide-ranging, and include detailed information about exactly where Consolidated
23 serves, exactly how many customers it has in specific locations, and specific information
24 regarding the facilities over which Consolidated provides service. *See, e.g.,* I.15-11-007,
25 Appendix B (summarizing initial information requests in competition proceeding).

26 In this and other proceedings in which Consolidated has been called upon to participate, it
27 has been forced to disgorge significant information about regulated and unregulated businesses

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1 that would be highly useful to competitors. Much if not all of that information has ostensibly
2 become “public records” that could be released pursuant to this Decision without any notice to
3 Consolidated or any formal action by the Commission.

4 **2. The Small LECs.**

5 The Small LECs are small, rural telephone companies serving rural and remote areas of
6 California. The Small LECs provide traditional voice telephone service on an intrastate regulated
7 basis, and, on an interstate regulated basis, they offer wholesale broadband Internet access service.
8 They also offer switched access and special access services. Through their affiliates, the Small
9 LECs offer a wide variety of other competitive services, including retail Internet access service,
10 long distance calling, and, in some cases, video services.

11 Because of the manner in which they are regulated and the markets in which they
12 operate, the Small LECs are uniquely situated to be harmed by the Decision’s new paradigm for
13 submission and release of documents submitted to the Commission. The Small LECs are
14 regulated on a traditional, rate-of-return basis, which requires the submission of extensive
15 financial information, including detailed service-specific revenue information, granular expense
16 information extending down to the general ledger level, and highly-detailed investment
17 information that identifies exactly when and to what extent the companies are investing. Although
18 they are regulated in a traditional manner, the Small LECs and their affiliates operate in
19 competitive markets in which their confidential business information and detailed regulatory
20 submissions could be readily used by current or potential competitors to inform unfair
21 competition. If the Small LECs’ confidential regulatory submissions are exposed to public view,
22 competing firms could easily determine how to target their marketing campaigns, investment
23 strategies, and service rollout plans to uniquely harm the Small LECs and their affiliates.

24 In their rate cases, and in numerous proceedings in which they participate, the
25 Small LECs have produced extensive information about their regulated and unregulated operations
26 that could tell a competitor virtually everything it would want to know about how to compete with
27 these companies. Any of these materials could be public records and any could be subject to

1 disclosure without notice or any formal Commission action under the Decision.

2 **B. Procedural Events Leading Up to the Decision.**

3 This proceeding began on November 14, 2014, when the Commission issued
4 Rulemaking (“R.”) 14-11-001. The Order Instituting Rulemaking (“OIR”) identified three
5 specific issues as within the scope of the proceeding, as follows:

- 6 1. Does the proposed revised general order comply with the CPRA setting
7 forth written guidelines for access to Commission records, consistent with
8 the Legislature's intent to make agency records accessible to the public?
- 9 2. Does the proposed revised general order reasonably improve the public's
10 access to public records and increase transparency of the Commission's
11 CPRA procedures without compromising the Commission's compliance
12 with applicable laws and protection of confidential information? If not,
13 please explain.
- 14 3. What categories of documents (both safety-related and non-safety-related)
15 should the Commission disclose, if any, in response to a CPRA request
16 without a vote of the Commission?

17 *OIR*, at 5 (emphasis added). Each of these issues was focused squarely on the Commission’s
18 compliance with the CPRA, and the proposed General Order (“G.O.”) 66-D attached to the OIR
19 had the same focus.

20 A Pre-Hearing Conference (“PHC”) was held on March 3, 2015, and, during the
21 PHC, there was broad agreement amongst the parties that workshops should be held to refine the
22 issues and possibly arrive at a consensus regarding the issues in the OIR. *See e.g.* Hr’g Tr. 55-56;
23 Scoping Memo and Ruling at 2. After the PHC, five months elapsed with no action in the
24 proceeding, and then the Scoping Memo was issued on August 11, 2015.

25 The Scoping Memo formalized the scope of the proceeding in accordance with
26 Rule 7.3 of the Commission’s Rules. The Scoping Memo focused the proceeding around eight
27 discrete issues, as follows:

- 28 1. Are documents submitted to the Commission subject to disclosure unless
deemed exempt from disclosure by the PRA or other law?
2. Is the proposed GO 66-D lawful and appropriate?
3. Does the proposed GO 66-D comport with §583 of the Public Utilities
Code?

4. Should the Commission provide notice to submitters that their documents are to be disclosed?
5. Is the procedure for resolving public records requests adequate?
6. Should there be a fee waiver?
7. What is the effect of the proposed GO 66-D on documents already submitted to the Commission?
8. Does the proposed GO 66-D improve public access to public records?

Scoping Memo, at 2-3. These issues, and only these issues, were the subjects that the parties understood would be addressed in the proceeding. Like the OIR, the issues in the *Scoping Memo* are focused on the Commission's process for the release of documents and the Commission's compliance with the CPRA.

After the *Scoping Memo* was released, only a few additional procedural events occurred before a Proposed Decision was issued (which led to the Decision). The *Scoping Memo* requested comments on a "Draft Proposal" that was provided as part of the *Scoping Memo*. Parties offered comments on the Draft Proposal on September 11, 2015. On February 2, 2016, a one-day workshop took place. Parties exchanged materials following the workshop, and some parties requested further workshops, but the Commission took no further formal action prior to issuing a Proposed Decision.

The Proposed Decision was released on June 28, 2016, and opening and reply comments were provided on the Proposed Decision on July 18, 2016 and July 25, 2016, respectively. After making limited changes to the Proposed Decision, the Decision was adopted at the Commission's August 18, 2016 meeting and the Decision was formally issued on August 25, 2016.

C. The Decision and Its Ramifications.

The Decision adopts two principal changes to Commission procedures: (1) a procedure for the release of documents provided to the Commission under a claim of confidentiality; and (2) a protocol governing the submission of confidential documents. The Decision states that it is an "interim and preliminary decision," but the Decision is in full effect and the changes to

1 Commission processes that it represents appears to have been implemented. *Decision*, at 21. The
2 material harm to Applicants from this Decision is occurring today and it will only increase the
3 longer that the Decision remains in place.

4 **1. The Release Procedure.**

5 The Decision fundamentally alters the procedure by which the Commission will evaluate
6 and release documents submitted subject to a claim of confidentiality. The Decision delegates to
7 its Legal Division staff the responsibility for “reviewing requests for confidential treatment of
8 documents.” *Decision*, at 31 (O.P. 2). The Decision authorizes Legal Division to “determine
9 whether records [submitted as confidential] should remain confidential, potentially without formal
10 action by the full Commission.” *Decision*, at 12. This delegation to Legal Division is not limited
11 to situations where documents are requested through CPRA requests. *Decision*, at 31 (O.P. 2).

12 The consequences of the delegation to Legal Division are wide-ranging and materially
13 harmful to Applicants. The Decision’s release procedure means that any or all of Applicants’
14 numerous confidential documents submitted to the Commission could be released by Legal
15 Division staff without any notice to Applicants, without any opportunity to be heard, and without
16 any formal adjudication or order from the Commission. This is fundamental shift in Commission
17 policy that could imperil many thousands of documents impacting competitive markets and
18 market participants. At the same time, this change brings critical decisions regarding the
19 confidential status of documents behind closed doors and allows them to be made without input
20 from interested parties.

21 Under the release procedure in the Decision, Consolidated and the Small LECs are at risk
22 of having extensive information regarding their customers, their networks, their operations, their
23 financials, their pricing strategies and strategic plans, and innumerable other competitively
24 sensitive documents released without ever knowing about it. The Decision makes no mention of
25 whether the Legal Division will invoke applicable CPRA exemptions or apply the CPRA
26 balancing test.³ The Decision supplies only the most scant guidelines as to how Legal Division

27 ³ The CPRA exemptions and balancing test are generally permissive, so absent clarification that they will
28 be invoked, it is unclear whether they will have any bearing on the Legal Division’s conclusions.

1 will evaluate claims of confidentiality except that Legal Division is not required to consider
2 anything further if documents are subject to only a “general marking of confidentiality.” *Decision*,
3 at 20. Before the Decision, the Commission’s process would have required a Commission
4 resolution or decision to release a confidential document, but now the process is entirely opaque
5 and appears to allow for administrative disclosure of any and all documents that parties submit as
6 confidential based solely on Legal Division’s judgment. Given the numerous confidential
7 documents Applicants submit to the Commission whose disclosure could cause material harm, the
8 Decision’s release protocol is of present and mounting concern.

9 **2. The Submission Protocol.**

10 The Decision also adopts a new process for “submission of confidential documents.”
11 *Decision*, at 17-18. Pursuant to the new submission protocol, parties must supply a declaration of
12 an officer, a duly-authorized agent or employee, or, in formal proceedings, an attorney, supporting
13 the designation of documents as confidential. *Decision*, at 18. The submission protocol also
14 forbids “general marking” of documents as confidential and forbids marking an entire document
15 as confidential if only a portion of the document is confidential. *Decision*, at 18, 20. These
16 requirements apply even where parties are providing documents that are hundreds or thousands of
17 pages long, and even where parties are required to supply dozens or hundreds of documents within
18 a short period of time. The Decision also requires parties to “mark” all documents, even where
19 documents are submitted in a format that does not permit “marking.” *Decision*, at 19. Although
20 the ramifications of failing to follow the protocol are not entirely clear in the Decision, it appears
21 that the Commission intends to authorize the release of any documents that are deemed non-
22 compliant with the protocol without any further analysis.

23 The Decision’s submission protocol means that each and every document submitted to the
24 Commission must be marked with particularity, justified by a specific provision of law, and
25 accompanied by a declaration. Compliance with this protocol will significantly increase the cost
26 and burden of submitting documents to the Commission, and this burden will be profound in the
27 context of companies who exchange hundreds or thousands of documents a year with the

Commission, many of which are confidential. In some recent Small LEC rate cases, ORA has issued more than 100 data requests and tens of thousands of pages of materials have been provided. In the competition proceeding, Consolidated has provided thousands of pages of highly confidential documents. The Decision has already created major compliance burdens for Applicants, and these costs will continue to compound over time.

III. STANDARD OF REVIEW AND SUMMARY OF LEGAL ERRORS COMMITTED BY THE DECISION.

Both the document release procedure and the document submission protocol present grave violations of the law, which must be corrected through this rehearing process to avoid subjecting the Decision to annulment by the Court of Appeal. Since the Decision arose in a quasi-legislative proceeding, it is subject to the standard of review in Public Utilities Code Section 1757.1. *See* Pub. Util. Code § 1757.1 (standard of review is applicable in all cases “other than a proceeding subject to . . . Section 1757); Pub. Util. Code § 1757 (limiting applicability of Section 1757 standard to “complaint,” “enforcement,” “ratemaking” and “licensing” proceedings). The Decision commits numerous legal errors that collectively violate almost all of the sub-sections of Public Utilities Code Section 1757.1.

The legal errors presented by the document release procedure are as follows:

- By permitting the release of documents submitted to the Commission as confidential without a Commission order, the Decision violates clear statutory direction in Public Utilities Code Section 583 and fails to “proceed[] in the manner required by law.” Pub. Util. Code § 1757.1(a)(2). For the same reasons, the release of confidential documents without a Commission order is an “abuse of discretion” and is an action “in excess of [the Commission’s] powers [and] jurisdiction.” Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(3).
- By delegating confidentiality determinations to Legal Division staff, the Decision exceeds the boundaries of proper agency delegation under established statutory restrictions and administrative law authorities. This constitutes a failure to “proceed[] in the manner required by law,” an “abuse of discretion,” and an action “in excess of [the Commission’s] powers [and] jurisdiction.” Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).
- By adopting rules that permit the release of confidential documents absent a CPRA request, the Decision reaches conclusions on matters that are outside the scope of

1 the proceeding, thereby contradicting binding appellate authority confining
2 Commission action in each proceeding to the matters identified in the Scoping
3 Memo. Again, this is a failure to “proceed[] in the manner required by law,” an
4 “abuse of discretion,” and a violation of the limitations on the Commission’s
5 “power [and] jurisdiction.” Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2),
6 1757.1(a)(3).

- 7 • By empowering its staff to release confidential documents based solely on the
8 manner in which they were submitted, the Decision violates the CPRA, which
9 requires that the Commission evaluate the propriety of releasing public records
10 based on a defined set of statutory standards regardless of how or in what form
11 those records were obtained. This attempt to side-step its responsibilities under the
12 CPRA by pushing them to parties who submit documents is an “abuse of
13 discretion,” a “failure to proceed[] in the manner required by law,” and an action in
14 excess of the Commission’s “power [and] jurisdiction.” Pub. Util. Code
15 §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).
- 16 • By adopting a document release procedure that will permit Legal Division to
17 disclose parties’ confidential information without any notice or an opportunity for
18 those parties to be heard, the Decision violates the procedural due process rights of
19 parties whose confidential material is held in the Commission’s records. In this
20 respect, the Decision violates the 14th Amendment to the United States Constitution
21 and thereby “violates [the] right[s] of Applicants under the Constitution of the
22 United States [and] the California Constitution.” Pub. Util. Code § 1757.1(a)(6).
23 For the same reasons, this is an abuse of discretion under and a “failure to proceed[]
24 as required by law. Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2).

25 The legal errors presented by the document submission protocol are as follows:

- 26 • In adopting rules governing the submission of confidential documents by public
27 utilities and other parties, the Decision errs in addressing matters that are outside
28 the defined scope of the proceeding, which was focused only on the procedures for
release of documents. This conflicts with binding appellate authority limiting
Commission action to the matters identified in the Scoping Memo for the
proceeding. It is a failure to “proceed[] in the manner required by law,” an “abuse
of discretion,” and a violation of the limitations on the Commission’s “power [and]
jurisdiction.” Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).
- In extending the submission protocol to formal proceedings, the Decision modifies
Rule 11.4 without proper notice. Neither the Scoping Memo nor the Order
Instituting Rulemaking (“OIR”) provided any notice that this proceeding would
involve a reconsideration of Commission procedural rules in formal proceedings,
and yet the submission protocol modifies Rule 11.4 governing motions for seal.
For the same reasons that the submission protocol itself exceeds the scope of the
proceeding, this change to Commission rules is unlawful under binding
Commission authority confining Commission action to the matters identified in the
Scoping Memo. This is a failure to “proceed[] in the manner required by law,” an
“abuse of discretion,” and a violation of the limitations on the Commission’s

“power [and] jurisdiction.” Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).

- The Decision fails to offer sufficient findings, justifications, or reasoning to support a submission protocol that imposes heavy burdens on parties submitting confidential documents to the Commission. The submission protocol is therefore the product of “arbitrary and capricious” agency decision-making, which is an “abuse of discretion.” Pub. Util. Code § 1757.1(a)(1). For the same reason, the decision is “not supported by the findings.” Pub. Util. Code § 1757.1(a)(4).

In each of these respects, the Decision violates the law and is subject to annulment pursuant to Public Utilities Code Section 1757.1. These are not minor infirmities, but are material errors with substantial prejudicial impacts on Applicants and other parties. They must be corrected on rehearing.

IV. THE DECISION VIOLATES STATUTORY AND CONSTITUTIONAL DIRECTIVES, AND CONFLICTS WITH BINDING APPELLATE AUTHORITY.

A. The Decision's Regulations Governing the Release of Confidential Documents Contravenes Statutory Authority, Violates Well-Established Administrative Law Requirements, and Exceeds the Scope of the Proceeding.

1. In Permitting Confidential Documents To Be Released Without A Commission Order, the Decision Violates the Express Terms of Public Utilities Code Section 583.

In delegating authority to Commission staff to determine the status of documents marked as confidential, the Decision ensures that confidential documents will be released without a formal order of the Commission. Public Utilities Code Section 583 expressly and unambiguously forbids this practice. Each and every Legal Division release of confidential information that occurs under this Decision will be statutorily unlawful. The delegation paradigm that purports to enable this circumventing of a statutory requirement is similarly unlawful, and it must be corrected on rehearing. Failure to vacate this aspect of the Decision will constitute a failure to proceed in the manner required by law, an abuse of discretion, and a deviation from the Commission’s jurisdictional restrictions. Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(3).

a. Public Utilities Code Section 583 Requires a Formal Order of the Commission Before Information Designated as Confidential Can Be Released.

The plain language of Public Utilities Code Section 583 forecloses the delegation of

1 confidentiality determinations to the Commission's Legal Division. Section 583 provides as
2 follows:

3 No information furnished to the commission by a public utility, or any business
4 which is a subsidiary or affiliate of a public utility, or a corporation which holds
5 controlling interest in a public utility, except those matters specifically required to
6 be open to public inspection by this part, shall be open to public inspection or made
7 public except on order of the commission, or by the commission or a commissioner
in the course of a hearing or proceeding. Any present or former officer or
employee of the commission who divulges any such information is guilty of a
misdemeanor.

8 Pub. Util. Code § 583 (emphasis added). Based on this language, confidential information can
9 only lawfully be disclosed by the Commission itself, and only through an official act qualifying as
10 an "order." It is "well settled that the Commission speaks only through its written decisions"
11 following a vote of the Commissioners, so this is not a requirement that could be satisfied by
12 Commission staff. D.00-09-042, at 6.

13 Since the only official "orders" issued "of the commission" are "decisions" and
14 "resolutions," these are the only procedural vehicles that could meet the standard of Public
15 Utilities Code Section 583. *See* Rule 15.1(a) (noting that the Commission votes on "decisions and
16 orders"); Rule 15.2 (explaining voting practices); Rule 15.3 (identifying contents of agenda for
17 Commission voting, including draft resolutions and proposed decisions). The issuance of
18 decisions and resolutions require compliance with the notice and comment requirements under the
19 Public Utilities Code, which is precisely what Section 583 is intended to accomplish. To release
20 confidential information outside of a proceeding, where the exception for the Assigned
21 Commissioner applies, the Commission must examine the confidential information and produce a
22 resolution or decision confirming the Commission's formal judgment that the document should be
23 disclosed.

24 The requirement of an individualized examination of the confidential information in
25 advance of its release is confirmed by numerous indicators of statutory construction and
26 Legislative intent. The plain language of the statute provides a strong indication of the
27 Legislature's intent. *Pacific Gas & Electric Co. v. Department of Water Resources*, 112

1 Cal.App.4th 477 (2003). If the Legislature intended to allow staff to make determinations
2 regarding confidentiality, it would not have used the term “order of the commission.” Moreover,
3 if staff could satisfy this requirement, it would be confusing to add the “misdemeanor” language
4 that appears in the last sentence of the code section. If Commission staff could be the arbiters of
5 when to release a confidential document, the Legislature would not have made it a crime for staff
6 to “divulge such information.” Pub. Util. Code § 583.

7 The requirement of an individualized, official order of the Commission to comply with
8 Section 583 is also confirmed by the relationship of this statute to other statutes in same "chapter"
9 of the code that were adopted at a similar time. Public Utilities Code Sections 581 and 582 both
10 articulate expansive Commission authority to request and receive a wide range of detailed
11 information. Section 583 provides the trade-off that balances these extensive informational
12 powers. Reading these sections together, it is clear that the Legislature intended to given the
13 Commission the power to collect a wide range of information, but it wanted to give utilities the
14 ability to protect aspects of that data that may be confidential. Indeed, this protection is the
15 bedrock that has historically allowed for the free flow of information between public utilities and
16 the Commission—it dates back to the 1911 Public Utilities Act that was incorporated into
17 California system of statutory codes in 1951, when it was codified as Section 583. (*See* Stats 1515,
18 c.91, p.131, §28(d); stats. 1951, c.765, p.2047, § 583). Reading these code sections as a whole, as
19 is required for valid statutory interpretation, it makes sense that utility designations of confidential
20 information would only be upset through a formal Commission process. *People v. Connor*, 115
21 Cal.App.4th 669, 691 (2004) (statutes must be read as a whole and as part of the "entire statutory
22 scheme.")

23 The importance of the “order” requirement under Public Utilities Code 583 as a
24 prerequisite to disclosure of confidential documents is further confirmed by the CPRA. Rather
25 than undermining Section 583, the CPRA explicitly incorporates Section 583 as an exemption to
26 the presumption that public records will be released. Gov. Code § 6276.36 (referencing Section
27 583 as an exemption to disclosure of documents under the CPRA). The CPRA therefore

1 recognizes that documents subject to Public Utilities Code Section 583 cannot be released without
2 first complying with Section 583's "order" requirement.

3 **b. Statutory Authority Bars Delegation of the "Order"**
4 **Requirement.**

5 Explicit statutory provisions governing agency delegation demonstrate conclusively
6 that the Decision's delegation of confidentiality determinations to Legal Division is unlawful.
7 Public Utilities Code 7 addresses the possibility that certain duties may be delegated by the
8 Commission to duly-deputized "officers," but it contains an exception whereby no such delegation
9 can occur "if this code expressly provides others." Pub. Util. Code § 7. Public Utilities Code
10 Section 583 is exactly such a limiting provision, as its "order" requirement "expressly provides
11 otherwise." The legality of the Decision's delegation does not need to be considered more broadly
12 because Section 583 unambiguously reflects the Legislature's intent to foreclose delegation in this
13 precise context.

14 **c. Confidentiality Determinations by the Commission's Legal**
15 **Division Are Not "Orders" Under Public Utilities Code Section**
16 **583.**

17 Legal Division staff determinations regarding confidentiality cannot comply with
18 Public Utilities Code Section 583 because staff is not the "Commission" and staff cannot issue
19 "orders." Neither the Public Utilities Code nor the Commission's rules create any ability for
20 Legal Division to issue "orders." Legal Division's role is to advise the Commission regarding the
21 "orders" that it issues, and those orders can only take the form of Resolutions and Decisions.

22 **d. The Decision to Delegate Authority to Legal Division Cannot**
23 **Qualify as an "Order" Under Public Utilities Code Section 583.**

24 The Decision suggests that its terms are compliant with Section 583 because it
25 constitutes a "General Order" that satisfies the "order" requirement. There are several problems
26 with this argument. First, no "general order" was enacted as part of the Decision. The Decision
27 only includes a blanket delegation to Legal Division to address confidentiality issues and release
28 documents it deems not properly confidential. *Decision*, at 31 (O.P. 2).

1 Second, even if the Commission had issued a “General Order,” a general order is akin to a
2 rule or regulation. Decision, at 14; *see, e.g., Investigation on the Commission’s Own Motion Into*
3 *the Operations and Practices of Harold E. Craft, Jr., doing business as Downtown Airporter and*
4 *Sacramento Airporter*, I.94-08-001 (FOF 2), 1994 Cal. PUC LEXIS 58; *Compensated*
5 *Intercompany Hauling Excluded From Definition of High Way Carriers*, Adoption of General
6 Order 146-A, D.82-09-086, 1982 Cal. PUC LEXIS 1278; for cases, *see, e.g., Los Angeles*
7 *Metropolitan Transit Authority v. Cal. Pub. Util. Comm’n*, 59 Cal. 2d 863, 365-866, 868 (1963);
8 *Federal Express Corp. v. Cal. Pub. Util. Comm’n*, 1993 U.S. Dist. LEXIS 13830 (N.D. Calif.
9 1993). Such a broad rule or regulation cannot be used as a substitute for the individualized, case-
10 by-case action that Section 583 requires.

11 Third, if the Commission could avoid individualized “orders” under Section 583 by simply
12 adopting a single order, there would have been no reason to adopt the term “order of the
13 commission” in the first place. The Decision’s reading of Section 583 would therefore render the
14 entire statute surplusage, contrary to established canons of statutory construction. *Imperial*
15 *Merchant Services, Inc. v. Hunt*, 47 Cal.4th 381, 390 (2009) (“[w]e do not presume that the
16 Legislature performs idle acts, nor do we construe statutory provisions so as to render them
17 superfluous.”). There are many examples in the Public Utilities Code where the Legislature
18 directs the Commission to enact rules and regulations, but the Legislature did not use that verbiage
19 in the case of Section 583. *See, e.g.* Pub. Util. Code § 1822 (“the commission shall adopt rules
20 and procedures . . .”); Pub. Util. Code § 454.52(a)(1) (“the commission shall adopt a process”).
21 With Section 583, the Legislature made a different decision and used the term “order,” and this
22 verbiage cannot be ignored or conflated with the separate concept of a “general order.”

23 Fourth, the Decision’s view of an “order” as including a “general order” is at odds with
24 other provisions of the Public Utilities Code that distinguish between “orders” and “general
25 orders.” Under Public Utilities Code Section 2104.5, for example, the Legislature refers to “any
26 rule, regulation, general order, or order of the commission,” clearly distinguishing between
27 “general orders” and “orders.” Public Utilities Code Sections 311(h) and 311.5(b)(3) also

1 specifically use the term “general orders.” However, Public Utilities Code Section 583 uses the
2 term “order,” which can only be distinguished from a “general order” by acknowledging that it is
3 specific to a particular factual or circumstantial application. In the case of Section 583, that is
4 precisely what the Legislature intended, as confidentiality determinations are case-specific and
5 involve detailed considerations of applicable law and the harm that may come to the specific
6 utility or submitting party from the disclosure.

7 **2. In Delegating Blanket Decision-Making Authority to the Commission's**
8 **Legal Division to Determine Whether Documents Are Confidential, The**
9 **Decision Violates Administrative Law Prohibitions on Delegation of**
 Discretionary Authority.

10 The Decision’s delegation of confidentiality determinations is also at odds with established
11 statutory and decisional authority prohibiting delegation of discretionary decisions assigned to
12 government agencies. As a matter of administrative law, these are not determinations that can be
13 lawfully delegated. In purporting to delegate them, the Decision commits an independent legal
14 error even aside from the Decision’s fundamental conflict with Public Utilities Code Section 583.
15 The Decision’s violation of delegation prohibitions is an abuse of discretion, a “failure to
16 proceed[] in the manner required by law, and an action beyond the Commission’s jurisdiction.
17 Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).

18 While ministerial tasks may be delegated, a power conferred upon public agencies and
19 officers that involves the exercise of judgment or discretion is in the nature of a public trust and
20 cannot be surrendered or delegated to a subordinate in the absence of statutory authorization.
21 *California School Employees Association v. Personnel Commission*, 3 Cal.3d 139, 143-144 (1970)
22 (the dismissal of employees involves the exercise of judgment or discretion and is reserved to the
23 Board of Trustees); *Sacramento Chamber of Commerce v. Stephens*, 212 Cal. 607 (1931);
24 *Southern California Edison Company v. Public Utilities Commission*, 227 Cal.App.4th 172 (2014)
25 (as modified) (hereinafter “*Southern California Edison Company (2014)*”). Delegation that
26 involves a purported assignment of a discretionary task from an agency or decision-maker to a
27 subordinate is unlawful.

1 The distinction between “ministerial” and “discretionary” tasks turns upon the exercise of
2 judgment. A “ministerial act” is “an act that a public officer is required to perform in a prescribed
3 manner in obedience to the mandate of legal authority and without regard to his own judgment or
4 opinion concerning such act’s propriety or impropriety when a given state of facts exists.” *U.S.*
5 *Ecology, Inc. v. State of California*, 92 Cal.App.4th 113, 138 (2001). “Discretion,” on the other
6 hand, is “the power conferred on public functionaries to act officially according to the dictates of
7 their own judgment.” *Id.*; see also *Southern California Edison Company (2014)*, 227 Cal.App.4th
8 at 196 (observing that the Commission is has distinguished between “delegable program
9 administration” and “nondelegable policy and oversight duty,” the latter of which involves “little
10 discretion” based on applying “state rules and decisions”).

11 Determinations of whether documents should be held as confidential cannot be validly
12 characterized as “ministerial tasks,” so delegation of these functions cannot be justified. An
13 evaluation of whether a document merits confidential treatment would require an extensive
14 analysis of applicable law, including affirmative statutory and common law protections for
15 confidential data and any pertinent CPRA exemptions. Even if no specific CPRA exemption is
16 applicable, a judgment would have to be made about whether the “public interest served by not
17 disclosing the record outweighs the public interest served by disclosure of the record.” Gov. Code
18 § 6255 (the CPRA “balancing test”). These are complex considerations that require careful
19 analysis and the exercise of judgment. They are not determinations that can be handled
20 administratively.

21 The unlawfulness of delegating these tasks to Legal Division staff is deepened by the fact
22 that the Decision offers only the most limited standards as to how Legal Divisions would apply the
23 law and how it would decide whether to release or withhold confidential documents. The
24 Decision does not clarify which CPRA exemptions would be honored, if any. It does not clarify
25 whether the balancing test would be applied, if at all. It does not describe the procedural apparatus
26 that the Commission’s staff could follow to attempt to process confidentiality issues in a
27 ministerial manner. See *Decision*, at 30 (FOF 7) (“The Commission’s internal processes for
28

1 review of potentially confidential documents have not been clearly and publicly described.”).
2 Particularly given the lack of any implementation standards, the Commission’s staff would have
3 no choice but to exercise extensive discretion regarding these confidentiality determinations.
4 Discretion of this sort is reserved to the Commission, so the delegation in the Decision is unlawful
5 if there were no explicit requirement for an “order” under Public Utilities Code Section 583.

6
7 **3. In Adopting Rules That Permit the Release of Confidential Documents**
8 **Outside of a CPRA Request, the Decision Exceeds the Defined Scope of the**
9 **Proceeding and Conflicts with Binding Appellate Authority.**

10 The Decision also errs in extending the reach of the Decision to the release of documents
11 outside of a CPRA request. This proceeding was directly focused and defined to address the
12 Commission’s process for reviewing, processing, and responding to CPRA requests, yet the
13 Decision extends authority to Legal division to “review[] requests for confidential treatment of
14 documents” without any restriction. *Decision*, at 31 (O.P.); *see also Decision*, at 12 (“Legal
15 Division could determine whether records submitted should remain confidential”). This means
16 that the Decision purports to enable Legal Division to establish the confidential or public status of
17 all documents, whether they have been requested through a CPRA request or not. In doing so, the
18 Decision fails to proceed in the manner required by law, is an abuse of discretion, and exceeds the
19 Commission’s lawful authority. Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).

20 The scope of each Commission proceedings is determined in the Scoping Memo, which
21 “determine[s] . . . the issues to be addressed.” Rule 7.3; *see also* Rule 1.3(f) (““Scoping Memo””
22 means an order or ruling describing the issues to be considered in a proceeding . . .”). Where a
23 Commission decision fails to confine its conclusions to those pre-defined issues, the Court of
24 Appeal has made clear that the decision will be annulled. *Southern Cal. Edison v. Pub. Util.*
25 *Comm’n.*, 140 Cal.App.4th 1085, 1104-6 (2006) (finding that the Commission violated its own rules
26 and committed legal error by reaching conclusion on subjects outside the Scoping Memo); *City of*
27 *Huntington Beach v. Pub. Util. Comm’n.*, 214 Cal.App.4th 566, 592-3 (2013). In *Southern*
28 *California Edison*, the Court of Appeal annulled a Commission decision that addressed

1 “prevailing wage” issues when the scope of the had been limited to “reverse auctions” and “bid
2 shopping practices.” *Southern California Edison, supra*, 140 Cal.App.4th at 1104-1105.

3 This Decision commits precisely the same error that was presented in *Southern California*
4 *Edison*. This proceeding was scoped to address the following eight issues, none of which extend
5 beyond the context of CPRA compliance and the potential release of documents in response to
6 CPRA requests:

- 7
- 8 1. Are documents submitted to the Commission subject to disclosure unless
deemed exempt from disclosure by the PRA or other law?
- 9 2. Is the proposed GO 66-D lawful and appropriate?
- 10 3. Does the proposed GO 66-D comport with §583 of the Public Utilities
11 Code?
- 12 4. Should the Commission provide notice to submitters that their documents
are to be disclosed?
- 13 5. Is the procedure for resolving public records requests adequate?
- 14 6. Should there be a fee waiver?
- 15 7. What is the effect of the proposed GO 66-D on documents already
16 submitted to the Commission?
- 17 8. Does the proposed GO 66-D improve public access to public records?

18 *Scoping Memo*, at 2-3. The first issue is squarely focused on the CPRA. The second, third,
19 seventh, and eighth issues relate to a proposed General Order that itself was focused on CPRA
20 compliance. The sixth issue refers to the possibility of a “fee waiver,” which is a specific
21 reference to the possibility that CPRA requesters can be charged a fee. Finally, the fourth issue
22 asks about whether notice should be provided to parties where their documents are subject to
23 disclosure, but no rational reading of this provision could extend beyond the CPRA context given
24 that the rest of the questions are all geared to those specific issues.

25 The issues in the OIR are equally explicit, and confirm the focus of this proceeding
26 on CPRA compliance and processing. The OIR addresses only three issues, as follows:

- 27
- 28 1. Does the proposed revised general order comply with the CPRA setting

1 forth written guidelines for access to Commission records, consistent with
2 the Legislature's intent to make agency records accessible to the public?

3 2. Does the proposed revised general order reasonably improve the public's
4 access to public records and increase transparency of the Commission's
5 CPRA procedures without compromising the Commission's compliance
6 with applicable laws and protection of confidential information? If not,
7 please explain.

8 3. What categories of documents (both safety-related and non-safety-related)
9 should the Commission disclose, if any, in response to a CPRA request
10 without a vote of the Commission?

11 *OIR*, at 5 (emphasis added). Each of these issues directly mentions the CPRA and is focused on
12 making the Commission's processes for responding to CPRA requests consistent with the CPRA
13 and applicable law.

14 Nothing in either the Scoping Memo or the *OIR* put the parties on notice that rules were
15 being developed in this proceeding that might allow for disclosure of confidential documents even
16 where no CPRA request has been made. This procedural error is not an issue of form over
17 substance, as this expansion of the Decision's document release protocol could be highly
18 prejudicial to Applicants. Based on the Decision as written, Legal Division could determine on its
19 own volition that a document marked as confidential does not merit confidential treatment and it
20 could post that document on the Internet without any consequence. That result is substantively
21 unlawful in numerous respects, as set forth herein, but it is also procedurally unlawful because
22 parties were never properly noticed that such an expansive view of Commission staff authority
23 would be advanced in this proceeding.

24 The Commission's rules and the appellate authority enforcing those rules exist to prevent
25 exactly this situation, where parties participate in a proceeding under one assumption about its
26 scope, and those assumptions are changed in the ultimate Decision when it is too late to offer
27 evidence or extensive argument as to the problems pertaining to the proposal. If the Commission
28 wished to advance such an expansive result, it had to include the issue in that manner in the
29 Scoping Memo. Its failure to do so renders any delegation beyond the CPRA context unlawful.

1 **4. In Relying on Parties' Submission Designations to Control CPRA**
2 **Determinations, the Decision Ignores the Commission's Responsibilities**
3 **Under the CPRA.**

4 The Decision concludes that "[a]ny document submitted to the Commission on or after 30
5 days from the effective date of this decision that only have a general marking of confidentiality . . .
6 may be released by Commission staff, with no formal action by the Commission required."
7 *Decision*, at 20. This directive to Commission staff not only violates Public Utilities Code Section
8 583, it contradicts the CPRA by suggesting that Commission staff could avoid the Commission's
9 duties under the CPRA as to documents that have only a "general marking." Contrary to the
10 Decision, the CPRA requires more, and the Commission cannot avoid its responsibilities under the
11 CPRA simply because of how a document is marked. In suggesting otherwise, the Decision
12 represents a failure to "proceed in the manner required by law." Pub. Util. Code § 1757.1(a)(2).
13 For the same reasons, it is an abuse of discretion that exceeds the Commission's lawful authority.
14 Pub. Util. Code §§ 1757.1(a)(1), 1757(a)(3).

15 The CPRA places the burden of compliance with its requirements on the agencies who
16 hold "public records," including the Commission. The burden of responding to CPRA requests
17 and assessing whether such requests seek "disclosable public records in the possession of the
18 agency" lies squarely with the agency. Gov. Code § 6253(c) (duty to respond to CPRA requests
19 and determine whether requested documents are "disclosable is assigned to "each state and local
20 agency.")). Similarly, the agency bears the burden to "justify withholding any record." Gov. Code
21 § 6255(a). The agency has the responsibility for surveying the applicable CPRA exemptions to
22 determine whether "the record in question is exempt from express provisions of [the CPRA]" and
23 it has the obligation to consider whether "on the facts of the particular case," the "public interest
24 served by not disclosing the record outweighs the public interest served by disclosure of the
25 record." *Id.* (application of CPRA "balancing test" assigned to agency); *see also County of Los*
26 *Angeles v. Superior Court*, 211 Cal.App.4th 57, 64 (2012) (government agency bears burden of
27 supporting CPRA exemptions). Nothing in the CPRA assigns any of these duties to parties who
28 may have originally submitted documents that are later the subject of a CPRA request.

1 Like all administrative agencies, the Commission must honor its responsibilities under the
2 CPRA when it receives a request for documents under the CPRA. Those responsibilities are not
3 waived or discharged based on how a party submitting a document "marks" the documents or how
4 general assertion of confidentiality is presented. The Decision's suggestion that the Commission
5 or its Legal Division could avoid the analysis required under the CPRA by relying on designations
6 from submitting parties is legally erroneous. The Decision must be corrected to clarify that
7 regardless of the manner in which documents are submitted or marked, the Commission will apply
8 the terms of the CPRA in assessing whether those documents should be disclosed.

9
10 **5. The Decision's Failure to Provide Notice and An Opportunity to Be Heard**
11 **to Parties' Whose Confidential Documents Would Be Disclosed Violates**
12 **Parties' Procedural Due Process Rights.**

13 The Decision also violates Applicants' procedural due process rights because it empowers
14 Legal Division to disclose parties' confidential information without any notice or an opportunity
15 to be heard. By delegating confidentiality determinations to staff without including any notice
16 provisions or procedural protections for submitting parties, the Decision permits Applicants'
17 sensitive data to be disclosed without Applicants ever knowing about it. The Decision is therefore
18 a violation of Applicants' due process rights, and is subject to annulment under Public Utilities
19 Code Sections 1757.1(a)(6), 1757.1(a)(1), and 1757(a)(2).

20 Both the U.S. Constitution and the California Constitution forbid the government from
21 depriving any person of liberty or property without "due process of law." U.S. Const., amend
22 XIV; Cal. Const., art. I, § 7. Due process precedent makes clear that a "person in jeopardy of a
23 serious loss" must be given notice of the case against him and an opportunity to meet it. *Mathews*
24 *v. Eldridge*, 424 U.S. 319, 348 (1976).

25 Applicants have vested property interests in their confidential information. The 14th
26 Amendment to the United States Constitution and Section 7, Article I of the California
27 constitution protect apply to "property," and "information" is a form of property. *DVD Copy*
28 *Control Association, Inc. v. Bunner*, 31 Cal.4th 864, 880 (2003) (noting that a "trade secret" is a

1 “limited property right in information”).⁴ In particular, to the extent that information “derives
2 independent economic value . . . from not being generally known to the public,” it can constitute a
3 property right that is entitled to all protections attendant to property. Civil Code § 3426.1(d)(1)
4 (California definition of trade secret); *see Ruckelhaus v. Monsanto*, 467 U.S. 986, 1003 (1964)
5 (acknowledging that corporations have property rights in trade secrets for the purpose of applying
6 unconstitutional takings analysis). Informational property rights are violated by involuntary
7 disclosure of the information, and the 14th Amendment and Section 7, Article I of the California
8 constitution forbid this from occurring without due process of law.

9 Under California law, Applicants also have a liberty interest at stake relative to a
10 government regulation that would expose their sensitive data to public view without any notice or
11 opportunity to be heard. The California courts have confirmed that each person has a “liberty
12 interest to be free from arbitrary adjudicative procedures.” *Gresher v. Anderson*, 127 Cal.App.4th
13 88, 104-105 (2005) (noting that California due process standards are “much more inclusive” than
14 the federal standard). This liberty interest is violated where, as here, a government agency creates
15 an arbitrary set of procedures for “adjudicating” the confidential status of documents. In this case,
16 that “arbitrary adjudicative procedure” involves no notice or opportunity to be heard of any kind.

17 The Decision delegates authority to its Legal Division staff to “review[] requests
18 for confidential treatment of documents” and “determine whether records submitted should remain
19 confidential, potentially without further formal action by the full Commission.” *Decision*, at 31
20 (O.P. 2), 12. No notice requirement accompanies this delegation, and none is included in the
21 Decision, so the Decision permits disclosures of confidential information without any notice to
22 affected parties. In fact, the delegation to Legal Division and the purported authorization to
23 release confidential documents “without further formal action by the full Commission” reverses

24
25 ⁴ Property interests in trade secrets are only “limited” in the sense that trade secret protection can be
26 diluted through voluntary public disclosure of the information by the property owner and in the sense that
27 trade secret protection can be overcome by other compelling rights. *See Ruckelhaus v. Monsanto*, 467 U.S.
28 986, 1003 (1964) (“[i]nformation that is public knowledge or that is generally known in an industry cannot
be a trade secret”); *DVD Copy Control Association, Inc., supra*, 31 Cal.4th at 876 (noting that dissemination
of trade secrets is subject to First Amendment scrutiny).

1 the due process protections that existed in the Commission’s procedures prior to the Decision.
2 Prior to this Decision, the Commission’s practice was to issue either a decision or a resolution
3 before releasing confidential records, and either of these formal processes would provide notice to
4 affected parties and an opportunity to be heard. Under the Decision, these decisions can be made
5 behind closed doors, without any awareness by – or input from – affected parties. Due process
6 protections do not countenance this result.

7 The Decision’s failure to provide for due process cannot be cured by a promise to address
8 the issue “later in the proceeding,” as the Decision suggests. *Decision*, at 23. The Decision notes
9 that parties, including Applicants, raised concerns regarding the lack of notice provisions in
10 comments on the Proposed Decision, but the Decision declines to make any changes to its
11 approach.⁵ The Decision states that it “acknowledges” the concerns regarding the lack of any
12 notice and an opportunity to be heard, but it fails to mitigate this result.⁶ The rules are in effect
13 today, so an amorphous promise to address the issue at a future time cannot render the current
14 rules constitutional. Rather, the Decision remains unconstitutional because it enables Legal
15 Division to violate parties’ property and liberty rights without proper notice or an opportunity to
16 be heard. This error must be corrected on rehearing.

17
18 **B. The Decision’s Adoption of the Document Submission Protocol Exceeds the**
19 **Bounds of the Proceeding, and Represents Arbitrary and Capricious Decision-**
20 **Making Unsupported by Sufficient Findings.**

21 **1. The Decision’s Requirements for Submission of Confidential Documents**
22 **Are Outside the Defined Scope of the Proceeding, and in Conflict with**
23 **Binding Authority From the California Court of Appeal.**

24 The Decision errs in adopting a document submission protocol in a proceeding focused
25 solely on the standards for release of documents. In extending the reach of the Decision beyond

26 ⁵ Applicants filed comments on the Proposed Decision as part of the Communications Industry Coalition,
27 or “CIC.”

28 ⁶ Applicants also note that the Decision rejects the proposal to implement a notice provision based on the
assertion that it would result in the process being implemented in a “piecemeal manner.” *Decision*, at 23.
This reasoning is exactly backwards, which renders the rejection of a notice provision arbitrary and
capricious. It is the lack of a notice process that makes the rules “piecemeal;” adding one would have the
opposite effect by making the rules more complete.

1 the defined list of issues in the Scoping Memo, the Commission fails to proceed in the “manner
2 required by law,” abuses its discretion, and exceeds its jurisdiction. Pub. Util. Code
3 §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).

4 As set forth above, the California appellate courts have carefully confined Commission
5 proceedings to issues in the Scoping Memo, and Commission decisions will be annulled where
6 they exceed those bounds. *Southern Cal. Edison v. Pub. Util. Commn.*, 140 Cal.App.4th 1085,
7 1104-6 (2006); *City of Huntington Beach v. Pub. Util. Commn.*, 214 Cal.App.4th 566, 592-593
8 (2013). The Commission’s expansion of its document release procedure beyond the CPRA
9 context is in itself a legal error, but the creation of the submission protocol deepens those errors by
10 addressing an entirely new type of process not encompassed by the Scoping Memo.

11 Again, the Scoping Memo includes eight issues, and only eight issues:

- 12
13 1. Are documents submitted to the Commission subject to disclosure unless
deemed exempt from disclosure by the PRA or other law?
- 14 2. Is the proposed GO 66-D lawful and appropriate?
- 15 3. Does the proposed GO 66-D comport with §583 of the Public Utilities
16 Code?
- 17 4. Should the Commission provide notice to submitters that their documents
are to be disclosed?
- 18 5. Is the procedure for resolving public records requests adequate?
- 19 6. Should there be a fee waiver?
- 20 7. What is the effect of the proposed GO 66-D on documents already
21 submitted to the Commission?
- 22 8. Does the proposed GO 66-D improve public access to public records?

23 Not one of these issues pertains to the submission of documents, so the submission protocol is
24 outside the proceeding was off limits in the Decision. A review of the OIR leads to the same
25 conclusion.

26 This proceeding simply was not about the manner in which documents are submitted; it
27 was about the manner in which documents would be reviewed and potentially released in response

1 to CPRA requests. The Decision’s submission protocol is categorically unlawful because it is
2 outside the scope of the proceeding. To correct this error, the Decision must be annulled and the
3 submission protocol vacated.

4 **2. In Extending The Document Submission Protocol to Formal Proceedings,**
5 **the Commission Further Exceeds the Boundaries of the Proceeding and**
6 **Modifies a Commission Procedural Rule Without Proper Notice.**

7 The document submission protocol also exceeds the boundaries of the proceeding in that it
8 alters a Commission procedural rule affecting formal proceedings – Rule 11.4 – without
9 explaining this modification or even acknowledging that it has done so. This is an abuse of
10 discretion, a failure to proceed in the manner required by law, and an action in excess of the
11 Commission’s jurisdiction. Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2), 1757.1(a)(3).

12 As discussed above, the submission protocol was not a lawful result in this proceeding
13 because the issue of submission of documents was not identified in the Scoping Memo or the OIR.
14 However, the error attendant to the submission protocol is compounded by its extension to formal
15 proceedings, which were never the subject of the issues in this proceeding. With reference to the
16 submission protocol, the Decision provides that the “same process shall be followed for
17 submitting documents to the Commission or staff of the Commission in a formal proceeding
18 unless a different process has been established in that proceeding” *Decision* at 18.

19 This directive conflicts directly with Rule 11.4, which already addresses requests to seal
20 documents in formal proceedings. Rule 11.4 requires parties to seek authority to place documents
21 under seal through a motion to an ALJ. However, it does not require declarations supporting
22 confidential treatment, nor does it forbid “general marking” or foreclose entire documents from
23 being marked confidential where it may not be reasonable to mark the documents with
24 particularity.

25 The parties had no notice that Rule 11.4 was subject to review in this proceeding. The OIR
26 made no mention of changing the process for seeking to seal documents in formal proceedings.
27 The Scoping Memo does not list this as an issue. Furthermore, the “Draft Proposal” attached to
28 the ruling transmitting the Scoping Memo does not address formal proceedings. In fact, the “Draft

1 Proposal” conveys the opposite impression by noting that “to the extent that records are ordered
2 produced in a formal proceeding . . . the following process will not apply.” *August 11, 2015*
3 *Assigned Commissioner Ruling*, at A-9.

4 Where the Commission seeks to modify its Rules of Practice and Procedure, it must
5 provide notice of the proposed modification in a properly-scoped proceeding and identify the
6 issues pertaining to the potential rule change in the Scoping Memo in the proceeding. These steps
7 did not take place, so Rule 11.4 cannot lawfully be changed.

8 **3. The Decision's Document Submission Requirements Are Arbitrary and**
9 **Capricious Regulations That Are Not Supported by Sufficient Findings.**

10 In addition to the fundamental scoping errors associated with the submission protocol, the
11 Decision rests upon arbitrary and capricious reasoning that lacks sufficient findings and which has
12 no foundation in record evidence. These are independent legal errors justifying rehearing and
13 necessitating annulment of the Decision. *See* Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(4);
14 *Woodbury v. Brown-Dempsey*, 108 Ca.App.4th 421 (2003) (if agency’s interpretation of a law or
15 regulation is “arbitrary and capricious,” that action constitutes an abuse of discretion).

16 Where an agency has failed to “adequately consider[] all relevant factors” or has failed to
17 supply a “rational connection between those factors” in connection with a decision, the agency has
18 acted in an arbitrary and capricious manner. *Carrancho v. California Air Res. Bd.*, 111
19 Cal.App.4th 1255, 1265 (2003); *see also McBail v. Solano County Local Agency Formation*
20 *Comm’n*, 62 Cal.App.4th 1223, 1230-1231 (1998). Actions that are “not supported by a fair or
21 substantial reason” are also arbitrary and capricious. *Zuehlsdorf v. Simi Valley Unified Sch. Dist.*,
22 148 Cal.App.4th 249, 256 (2007). Furthermore, where findings are not sufficient to support the a
23 Decision's conclusions, the Decision is unlawful. *See Greyhound Lines, Inc. v. Public Utilities*
24 *Commission*, 65 Cal.2d 811 (1967) (annulling the Commission’s decision for lack of adequate
25 findings).

26 There are four principal errors inherent in the Decision's findings and reasoning. First, the
27 Decision "fails to consider all relevant factors" because it offers no analysis of the burdens

1 imposed by the submission protocol on parties, nor does it consider the potential for the process to
2 cause delays or inefficiencies in Commission proceedings. Both of these are critical factors that
3 bear upon the feasibility of the submission protocol, and both concerns were raised in opening
4 comments on the Proposed Decision leading to the Decision. *Communications Infrastructure*
5 *Coalition Opening Comments on Proposed Decision*, at 3-4. The Decision also fails to address the
6 scenario, raised in the Communications Infrastructure Coalition comments, of documents that
7 cannot reasonably be marked because of the properties of the documents or the electronic
8 mechanism through which they are submitted. *Id.* at 7. The Decision fails to address these
9 "relevant factors," rendering it arbitrary and capricious.

10 Second, the Decision reaches findings that would compel a different conclusion or a
11 material adjustment to the submission protocol, but the necessary modifications were not made.
12 The Decision notes that situations where documents are "unusually complex or voluminous"
13 would be "an appropriate refinement to consider in the proceeding going forward." *Decision*, at
14 25. This reasoning acknowledges that the submission protocol is overly rigid in not accounting
15 for certain situations, but the Decision's only response is to push the issue to a later phase and
16 suggest that "in the meantime, . . . the submitting entity can request additional time to comply . . .
17 ." *Decision*, at 25. The finding that this is an "appropriate refinement to consider" undermines the
18 Decision's determination not to make the refinement.

19 Third, the submission protocol is not "supported by a fair or substantial reason."
20 *Zuehlendorf, supra*, 148 Cal.App.4th at 256. The Decision claims that the submission protocol will
21 "improve the ability of the Commission to respond in a timely manner to Public Records Act
22 requests," but the Decision fails to explain how submission designations could expedite the
23 exercise of statutory duties that are placed squarely on the Commission. *Decision*, at 29. As
24 discussed in Section IV(A)(4), above, the responsibility for the Commission to comply with the
25 CPRA is unrelated to how documents are presented or "marked."

26 Fourth, the few findings that the Decision offers to justify the submission protocol are
27 inadequate, speculative, and backed by limited or no evidence. The Decision claims that current

1 submission practices have "placed unnecessary burdens on Commission staff and have delayed
2 Commission responses to Public Records Act requests." *Decision*, at 29 (FOF 4). However, no
3 evidence of such burdens or delays was actually presented or evaluated in the proceeding, and the
4 Decision cites to none. The Decision also asserts that documents submitted are "commonly
5 marked as generically confidential," but no evidence on this subject was collected either. *Id.* (FOF
6 3). The Decision relies only on conjecture from statements made at a Pre-Hearing Conference by
7 a few parties. *Id.* at 6. The record also contains no specific evidence of non-confidential
8 documents being marked as "confidential," so the Decision's finding to that effect is without basis.
9 *Id.* at 29 (FOF 2).

10 The fact that none of these findings are support by legitimate evidence is not surprising
11 because the submission of documents is not an issue listed in the Scoping Memo as within the
12 scope of the proceeding. Even if that issue were within the scope of the proceeding, however,
13 there are not adequate findings to support the submission protocol, which is the product an
14 "arbitrary and capricious" abuse of discretion. Pub. Util. Code §§ 1757.1(a)(1), 1757.1(a)(2).

15 **V. REQUEST FOR ORAL ARGUMENT.**

16 Applicants request oral argument in connection with this Application. Under Rule 16.3(a),
17 oral argument may be granted if it will materially assist the Commission in resolving the
18 application, and demonstrate that the application raises issues of major significance to the
19 Commission, because the challenged order or decision: (1) adopts new Commission precedent or
20 departs from existing Commission precedent without adequate explanation; (2) changes or refines
21 existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity,
22 or public importance; and/or (4) raises questions of first impression that are likely to have
23 significant precedential impact. Under this standard, oral argument is appropriate and it should be
24 granted.

25 Each of the factors in Rule 16.3(a) militate in favor of holding an oral argument. First, by
26 allowing confidential documents to be disclosed without an order of the Commission, the Decision
27 creates an entirely new paradigm for release of documents that departs from more than a century

1 of Commission practice and precedent. Moreover, as discussed herein, an "adequate explanation"
2 for this shift in Commission policy has not been provided.

3 Second, the Decision effectuates a fundamental change in Commission precedent that
4 conflicts with the plain terms of a statute that has been in effect since 1911. This departure from
5 precedent merits the full attention of the Commission in a full oral argument.

6 Third, the Decision touches upon issues of profound "public importance" pertaining to the
7 status of highly-sensitive, proprietary, and competitively-damaging information derived from
8 utilities and other parties who have provided such information to the Commission. In many cases,
9 that information has been provided involuntarily pursuant to the Commission's authority over
10 public utilities, and yet the release of this information could harm the functioning of competitive
11 markets and create undue disparities between market participants.

12 Fourth, the issues implicated under the Decision are "of first impression" and "likely to
13 have a significant precedential impact." The protocols for submission and release of documents in
14 the Decision are unprecedented and they will control the disposition of many thousands of
15 confidential documents even in just the next few years.

16 This matter has enormous legal, policy, and financial implications for the Commission and
17 Applicants. Applicants anticipate that oral argument would allow for a full discussion of the legal
18 issues presented by this Application and the ramifications for Applicants and other parties if the
19 Decision is not vacated or corrected.

20 VI. CONCLUSION.

21 This Application presents clear and compelling grounds for rehearing, and
22 demonstrates that the Decision must vacated or significantly modified to avoid legal error. Both
23 the document release protocol and the document submission protocol under the Decision are
24 unlawful on numerous separate grounds, and the Decision's failure to provide notice of potential
25 releases of documents to affected parties violates those parties' procedural due process rights.
26 Under the Decision, it will be possible that highly-confidential, customer-affecting and market-
27 altering documents will be released through a ministerial process that does not involve notice to

1 the parties, a Commission order, or any administrative process whereby parties could be heard
2 regarding the potential release. At the same time, parties have been saddled with an unduly
3 burdensome document submission regime that whose adoption exceeds the proper scope of the
4 proceeding. These results cannot be countenanced under any reasonable reading of the statutory
5 or constitutional authorities that bind this Commission, and the Decision violates numerous sub-
6 sections of Public Utilities Code Section 1757.1.

7 The legal errors in the Decision must be swiftly and completely addressed on rehearing—it
8 is not sufficient to have these errors reconsidered in a potential Phase 2 of the proceeding. If the
9 errors remain, the unjustified burdens of the submission protocol on Applicants will continue to
10 mount and it will only be a matter of time before Applicants will be materially harmed by an
11 administrative release of a confidential document without notice. The Decision must be
12 expeditiously vacated or corrected to remove the legal errors identified in this Application.

13
14 Dated this 26th day of September, 2016.

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